
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: June 26, 1991
CASE NO. 86-ERA-24

IN THE MATTER OF

S.M.A. HASAN,
COMPLAINANT,

v.

NUCLEAR POWER SERVICES, INC.,
STONE & WEBSTER ENGINEERING CORP.,
TEXAS UTILITIES ELECTRIC CO., INC.,
RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

The Administrative Law Judge (ALJ) in this case arising under the Employee Protection Provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), submitted a Recommended Decision and Order (R. D. and O.) recommending that the complaint be dismissed. The facts are well summarized in the R. D. and O. at 2-4.

Briefly, Complainant was employed from January 1982 to August 1985 by Respondent Nuclear Power Services, Inc. (NPSI), as a civil structural engineer working on pipe supports at the Comanche Peak nuclear power plant owned by Respondent Texas Utilities Electric Company (TUEC). When the pipe support engineering effort was reorganized in the summer of 1985, one contractor, Respondent, Stone & Webster Engineering Corp., took over the work of several contractors, including NPSI. TUEC evaluated all the engineers in the pipe support area and made recommendations to Stone & Webster on which engineers to hire. TUEC recommended not hiring a number of engineers, including Complainant, and Stone & Webster did not hire him.[1] In January 1986, Complainant

applied for work with Stone & Webster at Comanche Peak but he was not hired. R. D. and O. at 2. Complainant alleged that the negative recommendation by TUEC in August 1985 and the refusal of Stone & Webster to hire him in January 1986 were motivated by his numerous safety and quality complaints to management and his threats to complain to the Nuclear Regulatory Commission during his tenure at Comanche Peak.[2]

The ALJ found that the failure of TUEC to recommend that Stone & Webster hire Complainant was based on his "chronic 'personality' problems with co-workers," R. D. and O. at 3, and was not based "even in part" on his safety complaints or threats to go to the NRC. *Id*. at 6. Many of Complainant's problems stemmed from religious differences between Complainant, a Moslem, and some of his co-workers who were Hindus. *Id*. at 3. In addition, the ALJ found that Complainant had an abrasive, overbearing and superior manner harmful to good working relationships with the other engineers and supervisors. *Id*.[3] Finally, the ALJ held that Complainant's layoff by NPSI in October 1985 was not motivated by his internal complaints or threats to go to the NRC. *Id*. at 6.

DISPUTED SETTLEMENT AGREEMENT

On January 27, 1989, Complainant filed a Motion to Enforce Settlement Agreement (Motion to Enforce), asserting that his attorney and an attorney for Respondent TUEC had entered into a settlement agreement. Complainant claimed that one of his former attorneys and an attorney for TUEC reached an oral agreement on June 27, 1988, and that the settlement was reduced to writing in a letter on June 28, 1988. Complainant S.M.A. Hasan's Statement of Facts and Law in Support of Motion to Enforce Settlement Agreement and for Attorney's [sic] Fees (Statement in Support) at 17. Complainant also asserts that he accepted TUEC's settlement offer by a telegram of July 11, 1988, to Robert A. Wooldridge, a Dallas attorney representing TUEC. Statement in Support at 28-30. TUEC opposed the motion, asserting that no such settlement had been reached. The Secretary issued an Order to Show Cause (OSC) on March 21, 1991, directing the parties to show cause why the Secretary should not proceed to decide this case on the merits, and the parties have submitted responses to the OSC.

A careful review of the record shows that no settlement was entered into here. On June 28, 1988, TUEC attorney Wooldridge wrote to Billie Garde, an attorney with the Government Accountability Project (GAP)[4] , purporting to "confirm . . . [an] agreement" of several outstanding disputes between TUEC and several individuals and an organization represented by GAP. Complainant's ERA complaint was one of the matters included in the settlement proposal. TUEC offered to pay four complainants represented by GAP $425,000, of which Complainant was to receive $200,000. However, the Wooldridge letter stated that there were several "conditions upon which the settlement . . . will become effective," including release of all claims against TUEC and the other Respondents, and the settlement and dismissal of a proceeding before an Atomic Safety and Licensing Board (ASLB) of the Nuclear Regulatory Commission brought by Citizens Association for Sound Energy (CASE). GAP represented CASE in the licensing proceeding.

Mr. Wooldridge's letter does not constitute a binding agreement. "[W]hen an offer or a counteroffer is accepted subject to a condition or reservation, neither party is bound to an agreement until the condition or reservation has been withdrawn or satisfied." *United States v. Newport News Shipbuilding & Drydock Co.*, 571 F.2d 1283, 1286 (4th Cir.) (quoting *Orient Mid-East Great Lake Service v. International Export Lines. Inc.*, 315 F.2d 519, 522 (4th Cir. 1963)), *cert. denied*, 439 U.S. 875 (1978). Indeed, in his 1989 Statement in Support, Complainant argued that two settlement terms proposed by Mr. Wooldridge, one in the letter, and one revealed by Ms. Garde on July 5, 1988, as having been part of the oral negotiations, were against public policy and illegal. Complainant urged the Secretary to strike these terms and enforce the remainder of the settlement. Complainant later vehemently rejected Mr. Wooldridge's settlement offer because of these terms, among others. See infra. The United States Court of Appeals for the Fifth Circuit recently described the Secretary's authority under the ERA as either to consent or not to consent to a settlement as written by the parties. The court there found no authority "to strike certain terms, and enforce the remainder, of a settlement without the consent of both [parties]." *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1154 (5th Cir. 1991).

On July 6, 1988, Michael Kohn wrote a letter on behalf of Complainant to Mr. Wolkoff, TUEC's hearing counsel, in response to notice Mr. Kohn had received of a "'*conditional*' settlement extended to [Complainant] by . . . [TUEC]." (Emphasis added.) Mr. Kohn's letter indicated that $200,000 was not a sufficient settlement offer. In addition, Mr. Kohn said "pre-conditioning (a settlement) on acceptance by the ASLB of the 'Joint Stipulation' [dismissing the ASLB proceeding] is completely repugnant to [Complainant's] conscience." The letter further asserted that the settlement offer was tantamount to "'hush' money" to purchase Complainant's silence on safety problems at Comanche Peak.

Also on July 6, Mr. Kohn wrote TUEC's licensing attorney Jack Newman, stating that the terms of the TUEC settlement offer were "unconscionable," and that "a general release by [Complainant] is worth twice [the $200,000 offer]." Mr. Kohn noted that the terms of a general release to be signed by Complainant had not been negotiated,[5] but that if the release included restrictions on complainant's right to "intervene, oppose or interfere with the termination of the ASLB [licensing] proceeding . . . such terms are contrary to public policy and unenforceable." Mr. Kohn said that he was "willing to enter into settlement negotiations in an attempt to reach a compromise on various points," but that "absent a formal written settlement offer tendered to [Mr. Kohn], we must conclude that no good faith offer to settle [Complainant's] case is on the table."

Complainant thus emphatically rejected TUEC's settlement offer on July 6, 1988, and made a counter offer of some settlement terms which would be acceptable. *See, e.g., In re Pago Pago Aircrash of January 30, 1974*, 637 F.2d 704, 706 (9th Cir. 1981). No representative of TUEC accepted those terms or made a counter offer between July 6, and July 11, 1988, when Complainant sent the telegram to Mr. Wooldridge which Complainant now asserts was his acceptance of TUEC's settlement offer.

I do not find the July 11 telegram to constitute an unequivocal agreement to settlement terms that are clearly and completely set forth in other documents in the record in this case. *See* OSC at 2-3. The thrust of Complainant's telegram is that he does not know with whom to deal in attempting to settle his ERA complaint. He said he:

> demands whomever with authority to settle [this case] contact M. Kohn. No written or oral contract from TU[EC] ever received by [Complainant] or his legal rep[resentative]. Let the real agent of TU[EC] come forward and contact my sole legitimate representative, M. Kohn. . . . Tentative acceptance of $200,000 acceptable upon receipt of papers [Complainant] must sign.

This is not the "unequivocal declaration by the parties that they have agreed to all the terms of a settlement . . . stating those terms clearly" required before the Secretary can approve a settlement. OSC at 2.

Furthermore, the considerable confusion over who represented Complainant and who represented TUEC, make virtually impossible any determination whether an agreement was reached here and what the terms were. *See* note 4 *supra*. Several communications from GAP attorneys and responses by the Kohns contributed to the confusion. On July 8, 1988, Louis Clark, Executive Director of GAP, wrote to Complainant asking whether Complainant had terminated GAP as his legal representative and setting forth the terms of a settlement offer by TUEC which Mr. Clark, as Complainant's attorney, was transmitting to him. Apparently, Mr. Clark was not aware of Complainant's July 5 notice "To Whom It May Concern." that Michael Kohn was now his attorney. Nor is it clear whether the "offer" summarized in Mr. Clark's July 8 letter was the same as the offer in Mr. Wooldridge's letter of June 28 to Ms. Garde, or whether Mr. Clark was aware of the July 6 letters from Michael Kohn rejecting the June 28 offer. Mr. Clark's letter said Complainant must respond before close of business July 11 which may have given the Kohns the impression that TUEC's "offer" would be held open until that time.

In addition, Michael and Stephen Kohn apparently had the impression that Richard Condit, another attorney with GAP, was acting as TUEC's agent for purposes of settlement of Complainant's case. The Kohns wrote to Mr. Newman on July 10, 1988, stating that on that day they "informed your agent for purposes of settlement of the Hasan matter, Mr. Richard Condit of . . .GAP," of Complainant's willingness to negotiate settlement of the case. The letter set forth some of the terms Complainant would require, including $500,000 to release his claims against all Respondents. The letter required submission to the Kohns of "the exact documents [Complainant] would be required to sign . . . . [and]" continued: "given [TUEC's] complete silence regarding numerous settlement letters sent by Michael Kohn to [TUEC's] counsel last week, we are forced to conclude that you have no intention of settling the Hasan matter . . . . "

Thus, the day before Complainant asserts he accepted TUEC's settlement offer, forming a binding contract which he urges me to approve, his attorney made a counteroffer involving substantially more money and bluntly stated that he believed TUEC had "no intention" of settling the case, and "[i]f we do not hear from your

authorized agent before 12:00 midnight [July 10] we must conclude that the prior settlement offers transmitted by Mr. Louis Clark and Ms. Billie Garde of GAP were fraudulent and done with the intent to coerce and intimidate and possibly bribe [Complainant]." Letter of July 10, 1988, from Michael D. Kohn and Stephen M. Kohn to Jack R. Newman. Mr. Newman responded to the Kohns' July 10 letter on July 11 stating that "neither Mr. Condit nor [GAP] is the agent of our firm for any purpose whatsoever . . . . "

Michael Kohn and Mr. Wooldridge have submitted affidavits stating the facts of their telephone conversations on July 11 and 12, 1988. Their affidavits conflict on the crucial point whether they agreed in one conversation on July 11 that a settlement had been reached. *Compare* September 27, 1989, affidavit of Michael Kohn, ¶ 12, *with* May 4, 1989, affidavit of Robert Wooldridge, ¶ 4. In ¶ 13 of his affidavit, Michael Kohn states that after Mr. Wooldridge told Mr. Kohn an agreement had been reached, Mr. Kohn called Mr. Wooldridge back "to submit . . . some lessor [sic] terms of the settlement [Complainant] wished to include in the text of a formal settlement document." The record does not contain this "formal settlement document", a draft of these additional terms, or any material specifying these terms, other than Mr. Kohn's affidavit, for the Secretary to review. Indeed, in ¶ 13 of the affidavit, Mr. Kohn acknowledges that Mr. Wooldridge told him he [Mr. Wooldridge] would have to speak to TUEC before adding these terms. *Cf. U.S. v. Newport News Shipbuilding*, 571 F.2d at 1286-87. These are material terms of the settlement which the Secretary must have an opportunity to review before approving the entire agreement. *See Macktal v. Secretary of Labor*, 923 F.2d at 1155-56 and n.25. For all of the above reasons, I conclude that no settlement was reached here.

THE ALJ'S RECOMMENDED DECISION

The record in this case has been reviewed and I find that it fully supports the ALJ's factual findings set forth in his "Findings of Fact, General Findings," R.D. and O. at 2-4, and his conclusion that Respondents did not violate the ERA in their treatment of Complainant. Complainant has not proven that Respondent's reasons for their actions were pretextual or that the actions more likely were motivated by discrimination. *Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 7-8, and cases cited therein. Accordingly, the complaint in this case is DISMISSED.

In the Motion to Enforce, Complainant moved alternatively to vacate the ALJ's decision and remand for a new hearing claiming that an individual who would have testified about one aspect of this case was, at the time of the hearing, bound by a settlement agreement in another ERA case not to "induce any attorney, party, [or] administrative agency" to call that individual as a witness in other ERA cases. Motion to Enforce at 4, and brief of Complainant Joseph J. Macktal in *Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, at 14-17, referred to therein. Complainant asserts that Mr. Macktal would have testified that the SAFETEAM in-house safety organization at Comanche Peak could not be trusted to maintain the confidentiality of whistleblowers, which was the reason Complainant did not make complaints to SAFETEAM. complaint

moved, therefore,,that the ALJ's findings about SAFETEAM, particularly his finding on Complainant's credibility in this regard, be reversed and a new hearing ordered.

This aspect of the Motion to Enforce is in the nature of a motion for a new trial under Rule 60(b) of the Federal Rules of Civil Procedure. The Fifth Circuit has held that "[a] motion for a new trial under Rule 60(b) is an extraordinary motion" which courts should be cautious in granting. *Washington v. Patlis*, 916 F.2d 1036, 1038 (1990). In addition, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, provide that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c) (1990).

As noted above, the record has been reviewed and found to support the ALJ's factual findings in his "Findings of Fact, General Findings." My decision is not based on the Respondent's proposed findings of fact which the ALJ adopted in his Specific Findings, R.D. and O. at 4. The only reference to SAFETEAM in the ALJ's General Findings is the fact, which Complainant does not dispute, that Complainant did not make any safety complaints to SAFETEAM. Id. at 3. I have not based my conclusion that Complainant did not carry his burden of proof on any derogation of Complainant's credibility as to why he did not raise his complaints with SAFETEAM. As I pointed out in note 3 above, the ALJ's finding on Complainant's failure to raise his complaints with SAFETEAM goes only to whether Complainant engaged in protected activity under the ERA.

Complainant has submitted no supporting affidavits, nor otherwise offered any showing that Mr. Macktal's alleged testimony "would produce a different result." *Washington v. Patlis*, 916 F.2d at 1039. Neither has Complainant shown that Mr. Macktal's testimony was the only way to have proven Complainant's truthfulness when he testified that "SAFETEAM was discredited and could not be trusted," nor that this alleged fact about SAFETEAM is "new and material evidence" which only became available after the closing of the record. 29 C.F.R. § 18.54(c). Finally, Complainant's suggestion that Respondent engaged in misconduct by entering into the settlement agreement with Mr. Macktal does not begin to meet his burden under Rule 60(b)(3) to "establish by clear and convincing evidence (1) that the other party engaged in fraud or other misconduct and (2) that this misconduct prevented the moving party from fully and fairly presenting his case." *Washington v. Patlis,* 916 F.2d at 1039, quoting *Montgomery v. Hall,* 592 F.2d 278, 278-79 (5th Cir. 1979). The motion to vacate the ALJ's R. D. and O. and remand for a new hearing is DENIED.

The parties' respective requests for attorney's fees also are denied. Section 210 of the ERA provides that if the Secretary finds that a violation has occurred and issues a remedial order, "the Secretary . . . shall assess against the person against whom the order is issued . . . costs and expenses (including attorneys' fees . . . " to 42 U.S.C. § 5851(b)(2)(B). Complainant is not entitled to attorney's fees because no order has been issued against Respondent. ERA Section 210 does not provide for an award of attorney's

fees against a Complainant, and Respondent has not cited any other source of authority for doing so. All other pending motions are DENIED.

SO ORDERED.

LYNN MARTIN
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] George Boerum, personnel manager for Stone & Webster, testified that Stone & Webster made employment offers to 79 of 110 engineers. T. 579-80.

[2] The ALJ dismissed the complaint against TUEC for terminating Complaint, and against Stone & Webster for refusing to hire him in August 1985, as untimely because Complainant did not file his complaint with the Department of Labor until February 18, 1986. ALJ Order Granting Partial Summary Judgment Dismissing Complaint, June 17, 1987. The hearing held by the ALJ was limited to whether TUEC and NPSI had blacklisted Complainant causing Stone & Webster not to hire him in January 1986. I agree with the ALJ's findings on timeliness. In addition, however, the findings of the ALJ discussed in the text, from which he concluded that the Respondents did not blacklist Complainant, apply as well to the questions of whether TUEC's negative recommendation and Stone & Webster's refusal to hire in August 1985 were motivated by an intent to retaliate against Complainant for protected activities. Indeed, the ALJ held that "there was neither blacklisting nor discrimination within the meaning of the Act." R. D. and O. at 6.

[3] The ALJ found that Complainant did not engage in protected activity because he did not pursue his technical concerns about construction of the Comanche Peak plant when he first made them, but only characterized them as safety concerns after Stone & Webster failed to hire him in August 1985. R. D. and O. at 5. In addition, the ALJ found that Complainant's activities of making internal complaints and threatening to go to the NRC are not protected activities in the Fifth Circuit, where this case arises, under *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1036 (5th Cir. 1984). The Secretary has reiterated in a number of cases, respectful disagreement with the holding in *Brown & Root*, and in cases arising within the Fifth Circuit has found internal complaints protected. *Bivens v. Louisiana Power & Light*, Case No. 89-ERA-30, Sec. Dec., June 4, 1991, slip op. at 4-5; *Lopez v. West Texas Utilities*, Case No. 86-ERA-25, Sec. Dec., July 26, 1988, slip op. at 5-6; *Willy v. The Coastal Corporation*, Case No. 85-CAA-1, Sec. Dec., June 4, 1987, slip op. at 3. Because I agree with the ALJ on the merits of this case, *United States Postal Serv. Bd. of Governors v. Aiken*, 460 U.S. 711, 715-16 (1983), I do not address here the internal complaints issue.

[4] Some of the ambiguity over the existence of a settlement may have been caused by confusion over who represented Complainant and who represented TUEC at the critical time at issue. Complainant was represented at the 1987 hearing before the ALJ by Michael D. Kohn and Stephen M. Kohn, attorneys who were at the time associated with GAP; attorneys Harvey J. Wolkoff and Katrina Weinig of Boston represented TUEC at the hearing. Ms. Garde and Mr. Wooldridge held settlement negotiations in June 1988. On July 5, 1988, Complainant issued a notice that Billie Garde no longer represented him and that his sole legal representative was Michael D. Kohn, who by that time had formed his own private firm with Stephen M. Kohn. Michael Kohn and Stephen Kohn made certain representations on Complainant's behalf with respect to settlement of this case which are described in the text *infra*. Among other things, Michael Kohn wrote a letter to another attorney, Jack R. Newman, who represents TUEC in the licensing proceedings on the Comanche Peak plant. In addition, Louis Clark and Richard Condit, attorneys with GAP, contacted Complainant by mail and by telephone in early July 1988 regarding a settlement offer by TUEC. Mr. Clark was under the impression that GAP still represented Complainant.

[5] Complainant contends that the "material terms of the Hasan settlement are *identical*" to two other cases settled and approved by the Secretary. Complainant's Response to OSC at 4-5. But both of those cases were submitted for review and approval with signed settlement agreements between the parties and signed releases from the respective complainants. *Radelich v. Ebasco Services, Inc.*, Case No. 88-ERA-24, Sec. Order, Aug. 3, 1989; *Goese v. Ebasco Services, Inc.*, Case No. 88-ERA-25, Sec. Order Dec. 8, 1988.